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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE SAEZ,

Defendant and Appellant.

A147152

(San Francisco County
Super. Ct. No. 206048)

Defendant Jose Saez challenges his resentencing on remand after we issued our opinion in *People v. Saez* (2015) 237 Cal.App.4th 1177.¹ He contends, and the Attorney General concedes, that the trial court erred by not awarding additional custody credits to reflect the actual time served between his original sentencing and his resentencing.² We also agree with the Attorney General that the court erred by awarding additional presentence conduct credits. Therefore, we modify the judgment to award Saez 3,142 days of actual credits and 331 days of conduct credits, but we otherwise affirm.

Saez was convicted of attempted murder and originally sentenced to prison for a term of 39 years to life on May 17, 2013. At that time, the trial court awarded 2,204 days

¹ We granted the Attorney General's unopposed request for judicial notice of this court's records and opinion in Saez's prior appeal.

² Penal Code section 1237.1 prohibits appeals "on the ground of an error in the calculation of presentence custody credits" unless the defendant first seeks relief in the trial court, which "retains jurisdiction after a notice of appeal has been filed" to correct any such error. Saez's appellate counsel requested recalculation of Saez's custody credits in a letter to the sentencing judge dated May 5, 2016, but as far as we are aware the trial court did not act on the request.

of actual credits and 331 days of conduct credits, for a total of 2,535 custody credits. The correctness of the original award is not at issue.

After this court reversed a finding that the attempted murder was willful, deliberate, and premeditated and a finding that one of Saez's prior convictions constituted a strike, Saez was resentenced to 27 years in prison on December 11, 2015. The probation report recommended that he be awarded 2,250 days of actual credits (an increase of 46 days) and 347 days of conduct credits (an increase of 16 days) for a total of 2,597 custody credits. In making its recommendation, the report made clear that the calculation did not include the time served between when Saez was delivered to prison on June 5, 2013, and when he returned to local custody for resentencing on November 12, 2015. Neither Saez nor the People objected to the report's calculation, and the trial court adopted it in pronouncing the sentence.³

We conclude that the sentence was erroneous in two ways. First, the award of actual credits was incorrectly calculated. The increase of 46 days of actual credits appears to have improperly excluded the time Saez spent in prison between his original sentencing and resentencing. "[W]hen a prison term already in progress is modified as the result of an appellate sentence remand, the sentencing court must recalculate and credit against the modified sentence *all actual time* the defendant has already served, whether in jail or prison, and whether before or since he was originally committed and delivered to prison." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 29.) Thus, Saez was entitled to the 2,204 days of actual credits he originally received in May 2013 plus 938 days of actual credits for time served between then and his December 2015 resentencing, a total of 3,142 days of actual credits. The trial court erred by awarding fewer actual credits.

³ We conclude that Saez's failure to object did not forfeit his claim because an error in the calculation of custody credits is "correctable without referring to factual findings in the record or remanding for further findings." (*People v. Smith* (2001) 24 Cal.4th 849, 852.) The Attorney General does not argue otherwise.

Second, the award of presentence conduct credits should not have been increased. A defendant “who remains behind bars pending an appellate remand solely for correction of sentencing errors . . . is not eligible to earn additional credits for good behavior as a presentence detainee.” (*People v. Buckhalter*, *supra*, 26 Cal.4th at p. 29.) Even when such a defendant “is temporarily housed away from state prison to permit his participation in the remand proceedings,” prison authorities have exclusive purview over the further accrual of conduct credits. (*Id.* at pp. 29-30, 40-41; see also *In re Martinez* (2003) 30 Cal.4th 29, 37.) Similarly, prison authorities are exclusively responsible for calculating conduct credits that accrue between sentencing and the defendant’s delivery to prison. (See *Buckhalter*, at pp. 29-31.) Therefore, when resentencing Saez the court should have awarded the same number of presentence conduct credits as it originally did. Any conduct credits to which Saez may be entitled for the period between his original sentencing and his resentencing will be calculated and awarded by state prison authorities.

The judgment is modified to award Saez 3,142 days of actual credits and 331 days of conduct credits, for a total of 3,473 custody credits. As so modified, the judgment is affirmed.

Humes, P.J.

We concur:

Dondero, J.

Banke, J.